



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

CIVIL SUIT NO. 3 OF 2018

NEELCON CONSTRUCTION CO. LTD.....PLAINTIFF

VERSUS

KAKAMEGA COUNTY ASSEMBLY.....DEFENDANT

RULING

1. The suit herein was initially commenced at the Kakamega Chief Magistrate's Court being Case Number 185 of 2017. The dispute is on an agreement between the parties dated 12th October 2015 for construction of certain facilities by the plaintiff allegedly for the defendant. The plaintiff would like the court to declare that there was a breach of the said contract by the defendant and it is also asking for costs of the suit.

2. Upon being served with the plaint, the defendant entered appearance but did not file defense. It instead raised a preliminary objection, filed herein on 16th August 2017, on two grounds, being that the suit was defective and bad in law and was also contrary to the conditions of the contract between the parties on settlement of disputes.

3. It transpired that in the body of the plaint, but not in the prayers, ostensibly in a misconceived, ill-advised and thinly-veiled scheme to avoid paying higher court fees, the plaintiff seeks, at paragraph 9 of its amended plaint of 20th November 2017, judgment for Kshs. 211, 450, 626.00. That no doubt placed the matter way out the jurisdiction of the lower court. The matter was subsequently transferred to the High Court for disposal. Directions were given on 20th March 2018 that the preliminary objection be disposed of by way of written submissions.

4. There has been compliance and the two sides have lodged their respective submissions in court. I have read through the submissions and noted the arguments made therein. The said written submissions are on record and I need not have to recite them in this ruling.

5. The issues are really fairly straightforward. On the first issue, the defendant argues that the plaintiff is non-suited to the extent that it has sued the defendant herein instead of the County Assembly Service Board. On the second issue, it is argued that the matter herein ought to have been referred to arbitration in terms of the contract between the parties.

6. On the first issue, I have been referred by the defendant to three provisions that are said to establish the County Assembly Service Board, that is to say section 12 of the County Governments Act, No 17 of 2012, section 12 of the County Assembly Services Act 2017 and section 6 of the Kakamega County Assembly Service Act, No. 7 of 2015. Section 12 of the County Government Act says as follows –

‘(1) There shall be a county assembly service board for each county assembly.

(2) The county assembly service board shall be a body corporate with perpetual succession and a common seal’

Section 12 of the County Assembly Services Act 2017 provides that –

‘In addition to the powers of the Board under section 12(2) of the County Governments Act, the Board shall have the power to –

a. ...

b. Sue and be sued;

c. ... ‘

Section 6 of the Kakamega County Assembly Service Act essentially constitutes the County Assembly Board as a corporate body with perpetual succession with the power to deal with property, borrow, invest, enter into contracts and to do all such things that a corporate body can legally do.

7. The plaintiff has not in its submissions addressed this aspect of the preliminary objection.

8. The party sued by the plaintiff is the County Assembly of Kakamega. The said defendant is the legislative arm of the County Government of Kakamega. The administrative wing of the defendant is the County Assembly Service Board, which is a body corporate established under the provisions cited in paragraph 6 here above. The board is therefore an artificial person in the mold of a limited liability company. It can sue and be sued, it can own property, it can enter into binding contracts and it enjoys perpetual succession. The County Assembly is comprised of elected and nominated members, its principal role is legislation and oversight. It has no administrative role since it is not a body corporate. It cannot enter into any legally binding contracts. The contract the subject of these proceedings could not have been entered into by the County Assembly, but rather its administrative wing, the County Assembly Service Board. If there is any body to be sued with regard to the contract it should be the County Assembly Service Board and not the County Assembly. Quite clearly the plaintiff has sued the wrong party, it is non-suited.

9. The second aspect of the objection is that the plaintiff ought not to have rushed to court instead of first of all exhausting the machinery for dispute resolution set out in the contract alleged to have been breached. The plaintiff raises technical issues that the matter of the referral of the matter to arbitration in terms of the contract was raised out of time. It cites section 6 of the Arbitration Act 1995 to support its contention.

10. Kenyan case law on reference of matters to arbitration in terms of a contract to that effect militate towards respecting such provisions. In *RKN & Co. vs. Provincial Insurance Company Ltd* (1982) KLR 421, the court stated that there is a duty to refer a matter to arbitration if such a clause is included in the contract. In *Joab Henry Onyango Omino vs. Lalji Meghji Patel & Co. Ltd* (1995-1998) 1 EA 264, the Court of Appeal said that once parties choose to determine disputes or differences through domestic forum other than the courts then that choice should not be easily brushed aside. See also *Rift Valley Textiles Limited vs. Cotton Distributors Incorporated* (1982) KLR 427.

11. My understanding of the statutory provisions and case law on this is that where there is such a provision in a contract, and one party sues, the defendant who desires reference of the matter to arbitration in terms of an arbitration clause should not file a defense, instead he should at the point of entering appearance pray for stay of proceedings to await the outcome of the arbitral proceedings. That explains why the defendant herein has not filed a defense. However, I note that the defendant has not applied to stay proceedings to await the outcome of the arbitration.

12. I do not think that the failure to refer the matter to arbitration in terms of that clause renders the suit herein incompetent. The way out is to have it stayed to pave way for the arbitral proceedings. The failure too to ask for stay within the time allowed, in my view, does not seal the fate of the defendant. That is a procedural technicality that can be addressed through Article 159 of the Constitution, and which can be cured by way of extension of time to have the matter referred to arbitration.

13. In the end I hold that the suit herein is incompetent to the extent that the plaintiff has sued the wrong party. The suit was incompetent from inception, and in my view it cannot be cured by amendment. The plaintiff is non-suited. In other words there is no suit that can be cured by amendment. I shall uphold the defendant's preliminary objection dated 16th August 2017 and accordingly strike out the suit herein with costs to the defendant.

DATED, SIGNED and DELIVERED at KAKAMEGA this 8TH DAY OF AUGUST, 2018

W. MUSYOKA

JUDGE